



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: DECEMBER 06, 2022

IN THE MATTER OF:

Appeal Board No. 613443 A

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determination holding ADELCHI, INC. (hereafter referred to as "Adelchi" or the "employer") liable for tax contributions, effective the first quarter of 2009, based on remuneration paid to DT (hereafter referred to as the "claimant") and to all other construction workers similarly situated as employees, pursuant to the common law test of supervision, direction or control, and the Construction Industry Fair Play Act effective October 26, 2010 (Appeal Board No. 613442A).

The Department of Labor deemed the claimant to be an employee with credited remuneration from the employer regarding the claim for benefits effective February 6, 2012 (Appeal Board No. 613443A).

The employer requested a hearing, contending that the claimant and all other individuals similarly situated performed services as independent contractors.

The Administrative Law Judge held combined hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant, and on behalf of the employer and the Commissioner of Labor. By combined decision filed May 15, 2014 (A.L.J. Case Nos. 314-01126 &), the Judge granted an application to reopen a prior case, overruled the initial determination based on the common law test of supervision, direction, or control, and sustained the initial determination based on the Construction Industry Fair Play Act effective October 26, 2010.

The employer appealed the Judge's decision to the Appeal Board, insofar as it sustained initial determination based on the Construction Industry Fair Play

Act effective October 26, 2010. The employer submitted a written statement. By combined decision filed October 19, 2018 (Appeal Board Nos. 580552 & 580553), the Board affirmed the Judge's decision. Upon an appeal to the Appellate Division, the Court reversed and remitted to the Board for "further proceedings not inconsistent with this Court's decision." Matter of Tuerk (Adelchi, Inc.), 184 AD3d 295 (3d Dept 2020).

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: Adelchi is a construction management company that is owned and operated by a sole individual. In part, Adelchi contracts with kitchen and bath design and supply firms (e.g., Kitchen World or Kitchen Advantage) (hereafter "designers") that had contracted with homeowners for residential renovation and remodeling. To that end, Adelchi acts as the general contractor for the designers by procuring various subcontractors to work on the contracted remodeling jobs. Adelchi advertised on Craigslist for trade workers offering a starting payrate of \$15 to \$18 dollars per hour. From its maintained list of subcontractors, Adelchi offers work to specific trade individuals depending on the scope of work (e.g., carpentry, tile, etc.). Upon their availability, Adelchi hires the needed individuals and pays them an hourly rate with no written contracts. Depending on workflow, Adelchi will have various subcontractors come and go at various times on a particular job. Often, Adelchi will have multiple jobs simultaneously underway.

Adelchi instructs subcontractors where and when to start a job, what work had to be done, and when that job needed to be completed. For the various jobs that may be occurring simultaneously, Adelchi handles the workflow and manages the subcontractors to ensure that requisite trades are available at each job for proper and timely completion. Adelchi ensures that the building materials and supplies, which are provided by the designers, are delivered to the jobsite in a timely manner. Wanting to know exactly when the subcontractors were on each jobsite, Adelchi required subcontractors to keep track of their hours and to complete weekly timesheets, which were created and supplied by Adelchi that bears its letterhead. Each weekly blank timesheet lists Monday through Sunday with their respective dates filled-in, and blank spaces under the headings project name, task, hours, overtime hours, and total. On a regular basis, Adelchi reviewed and inspected the work. Occasionally, a dissatisfied homeowner may complain to a designer, and ultimately, if needed, Adelchi would have the pertinent subcontractor remedy any work issues. Adelchi provided the workers with polo shirts bearing Adelchi's name.

Around 2010, Adelchi engaged an individual renovation and remodeling subcontractor ("BA") on a particular residential kitchen remodeling job. During the job, BA complained to Adelchi of the need for additional help because BA was running behind schedule. In response, Adelchi said "if you know somebody, see if you can bring him on and I'll pay for it." BA knew the claimant who also did renovation and remodeling, including framing, drywall, electrical, plumbing, painting, windows and doors, and tile work. BA informed the claimant of the potential work and referred the claimant to Adelchi's Craigslist advertisement. BA advised Adelchi that the claimant was talented, that he worked under the business name of Snap Improvements LLC, and that he was interested in earning \$18 per hour. Adelchi required and obtained from the claimant various

proof of business documentation, e.g., articles of incorporation, workers compensation coverage, liability insurance, and a W-9 form. Thereafter, Adelchi engaged the claimant as a remodeling subcontractor without a written contract starting at \$17 per hour and a promise of a raise dependent on his workmanship.

Pursuant to the foregoing, the claimant worked for Adelchi from about November 2010 through October 2011. He used his own hand tools, as well as a tile saw that was made available on the jobsite. Generally, the claimant worked for Adelchi from Monday through Friday, 8:00 A.M. to 5:00 P.M., and an occasional Saturday. The claimant presumed he needed to request permission for time off, although the subject never arose. On one occasion, Adelchi paid the claimant to correct crown molding that was installed upside down.

In the course of claimant's engagement with Adelchi, the claimant received three polo shirts bearing Adelchi's name. Adelchi believed the claimant to be a talented worker. After a short while, Adelchi gave the claimant a \$1.00 raise to \$18 per hour. On one occasion, by check payment issued August 12, 2011, the claimant received an additional \$150 payment labeled as a "bonus".

The claimant completed the Adelchi's timesheets and submitted them at the end of each week to be paid. The claimant received no reimbursement for expenses and no employee fringe benefits. Adelchi paid the claimant through his company, Snap Improvements, LLC, with no deductions for withholdings. Adelchi issued IRS 1099-MISC tax forms to Snap Improvements, LLC. The claimant, along with two other partners, operated Snap Improvements LLC, which filed federal

Returns of Partnership Income (form 1065).

OPINION: Based on the prior proceedings, the sole issue before the Board is the applicability of the Construction Industry Fair Play Act, codified in Article 25-B of the Labor Law (§ 861 et seq., effective October 26, 2010),

which "contains a statutory presumption that a person performing services for a construction contractor shall be classified as an employee unless it is demonstrated that such person is an independent contractor in accordance with the three criteria of the ABC test set forth in Labor Law § 861-c (1) or a

separate business entity ... by satisfying all 12 criteria set forth in Labor Law § 861-c (2)." Matter of Truax & Hovey, Ltd., 205 AD3d 1243, 1244 (3d Dept

2022). See Matter of Fleetwood Drywall Inc., 201 AD3d 1059 (3d Dept 2022); and Matter of Barrier Window Systems Inc., 149 AD3d 1373 (3d Dept 2017); see also, Labor Law § 511 (1) (b) (1-b).

The ABC test provides that an individual construction trade worker will not be presumed an employee if all three prongs are met:

(a) the individual is free from control and direction in performing the job, both under his or her contract and in fact;

(b) the service must be performed outside the usual course of business for which the service is performed; and

(c) the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue.

Labor Law § 861-c (1).

The second test, referred to as the 12-point "separate business entity" test, provides that the presumption of employment is overcome if the individual construction trade worker is deemed a separate business entity from the contractor if all twelve prongs are met:

(a) the business entity is performing the service free from the direction or control over the means and manner of providing the service, subject only to

the right of the contractor for whom the service is provided to specify the desired result;

(b) the business entity is not subject to cancellation or destruction upon severance of the relationship with the contractor;

(c) the business entity has a substantial investment of capital in the business entity beyond ordinary tools and equipment and a personal vehicle;

(d) the business entity owns the capital goods and gains the profits and bears the losses of the business entity;

(e) the business entity makes its services available to the general public or the business community on a continuing basis;

(f) the business entity includes services rendered on a Federal Income Tax Schedule as an independent business or profession;

(g) the business entity performs services for the contractor under the business entity's name;

(h) when the services being provided require a license or permit, the business entity obtains and pays for the license or permit in the business entity's name;

(i) the business entity furnishes the tools and equipment necessary to provide the service;

(j) if necessary, the business entity hires its own employees without contractor approval, pays the employees without reimbursement from the contractor and reports the employees' income to the Internal Revenue Service;

(k) the contractor does not represent the business entity as an employee of the contractor to its customers; and

(l) the business entity has the right to perform similar services for others on whatever basis and whenever it chooses.

Labor Law § 861-c (2).

Initially, the evidence fails to meet the first prong of the ABC test that the "individual is free from control and direction in performing the job". Labor Law § 861-c (1) (a). Using very similar language as the common law test, this

first prong is a question of whether the purported employer exercised or reserved the right to exercise sufficient supervision, direction or control to establish an employer-employee relationship. See *Matter of Tuerk (Adelchi Inc.)*, 184 AD3d 295 (3d Dept 2020). Significantly, Adelchi maintained a list of trade workers to call from, advertised for trade workers at an hourly rate, paid workers an hourly rate with no written contract, managed the workflow, required completion of Adelchi's weekly timesheets, reviewed and inspected the work, and provided Adelchi's polo shirts. Also, Adelchi screened the claimant before hiring, gave the claimant an hourly raise, paid the claimant to repair work, and gave the claimant a bonus payment. Furthermore, the claimant supplied only hand tools and worked at jobsites as Adelchi directed, which was basically on a full-time schedule, with the presumption to need permission for time off. Under the totality of the circumstances, the evidence establishes that Adelchi exercised, or reserved the right to exercise, sufficient supervision, direction or control over the claimant to hold an employment relationship under Labor Law § 861-c (1) (a).

Also, the evidence fails to meet second ABC prong that the "service must be performed outside the usual course of business for which the service is performed". Labor Law § 861-c (1) (b). Here, we are unpersuaded by Adelchi's

contention that it is in the business of construction management versus the claimant's business of renovation and remodeling. Significantly, we hold that Adelchi's construction management business is equivalent to being a general contractor for its client-designers to renovate residential homes. Notably, Adelchi performs duties that mirror that of a general contractor, namely, to engage and manage subcontractors for the ultimate goal of completing a job. Accordingly, all trade work is an integral part of its general contracting business labeled as construction management. See Appeal Board No. 604247; and Appeal Board No. 585540. Therefore, we conclude that the claimant's services were inside the usual course of Adelchi's general contracting business under Labor Law § 861-c (1) (b).

As Adelchi has not satisfied the ABC test under Labor Law § 861-c (1), we must address the separate business entity test, and in so doing, we conclude that

Adelchi fails to meet prongs one, three, four and eight of the 12-point separate business entity test, namely, Labor Law § 861-c (2) (a), (c), (d) and (h).

Similar to the first prong of the ABC test (Labor Law § 861-c [1] [a]), the first prong of the 12-point separate business entity test (Labor Law § 861-c [2] [a]) is equivalent to the common law test of supervision, direction or control. See Matter of Tuerk (Adelchi Inc.), 184 AD3d 295 (3d Dept 2020). Consistent with the above analysis under Labor Law § 861-c (1) (a), the

evidence establishes that Adelchi exercised, or reserved the right to exercise, sufficient supervision, direction or control over the claimant to hold an employment relationship. Accordingly, we conclude that Adelchi failed to meet prong one of the 12-point separate business entity test, namely, Labor Law § 861-c (2) (a).

Next, Labor Law § 861-c (2) (c) requires that the "business entity has a

substantial investment of capital in the business entity beyond ordinary tools and equipment and a personal vehicle". Here, the record establishes that the claimant merely owned hand tools and utilized a tile saw made available on the jobsite, but does not establish "a substantial investment of capital" in Snap Improvements LLC. The record also fails to establish that the "business entity owns the capital goods and gains the profits and bears the losses of the business entity" under Labor Law § 861-c (2) (d). Not only did the claimant

only own hand tools, but the claimant also had no other capital goods, including the materials and supplies that were all provided at the jobsite. See Matter of Fleetwood Drywall Inc., 201 AD3d 1059 (3d Dept 2022). Furthermore, as an hourly worker, who was provided a \$1.00 raise and given a bonus payment, the claimant did not have a risk of loss from involvement with Snap Improvements LLC. Finally, although Labor Law § 861-c (2) (h) requires

that Snap Improvements LLC "obtain[] and pay[] for the license or permit in the business entity's name", the record fails to establish that claimant did so as an hourly worker. Accordingly, we conclude that Adelchi has not overcome the separate business entity test.

Under these circumstances, the Adelchi has failed to demonstrate that the claimant is an independent contractor pursuant to the ABC test set forth in Labor Law § 861-c (1) or that the claimant is a separate business entity set

forth in Labor Law § 861-c (2), and therefore, has failed to overcome the

presumption of employee status. Accordingly, the claimant was properly held as a statutory employee with covered remuneration as of the effective date of the Construction Industry Fair Play Act, namely, October 26, 2010.

DECISION: The combined decision of the Administrative Law Judge, insofar as appealed, is affirmed.

The initial determination, holding ADELCHI, INC. liable for tax contributions based on remuneration paid to the claimant and to all other construction workers similarly situated as employees effective the first quarter of 2009, based on the common law test or the Construction Industry Fair Play Act, is modified to be effective October 26, 2010, based on the Construction Industry Fair Play Act, and as so modified, is sustained (Appeal Board No. 613442A).

The claimant is deemed an employee of and is credited with remuneration from this employer effective October 26, 2010 (Appeal Board No. 613443A).

The employer is liable with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER